

Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?

JOHN C. BECKER*

I. INTRODUCTION

At the time the first recreational use statutes were adopted in the late 1950s and early 1960s, the generally prevailing view of a landowner's duty to those entering his or her property varied according to the injured party's status in relation to the landowner. Three classifications describing that status developed. The first classification is that of trespasser, who is a person on the land without the owner's express or implied permission. A landowner has a minimal obligation to a person classified as a trespasser. Usually, this includes the duty to avoid intentional, willful, or wanton conduct that injures the trespasser or damages his property.¹ The second classification is that of licensee. A licensee is one with permission to enter the premises. The owner owes a duty to avoid willful, wanton, or reckless conduct that injures the licensee, and to warn the licensee of defects or dangerous conditions that exist on the premises.² The third classification is that of invitee. An invitee is an individual who is either expressly or impliedly invited onto the owner's land to pursue some commercial or other interest of the owner and the entering individual. Landowners owe a duty to invitees to make their premises reasonably safe for entry. Therefore, a landowner must take reasonable care to inspect the premises to discover actual conditions and latent defects that pose a threat to the invitee.³ Once discovered, a landowner has a further responsibility to either repair the defects or warn the invitee of their existence.⁴

In light of the law, landowners faced pressure from others who wanted to use the owner's land for recreational activities, particularly

* Associate Professor of Agricultural Law and Economics, The Pennsylvania State University, Pennsylvania; Member of the Pennsylvania Bar; B.A., LaSalle College, 1969; J.D., Dickinson School of Law, 1972.

1. See, e.g., *Graham v. Sky Haven Coal, Inc.*, 386 Pa. Super. 598, 563 A.2d 891 (Pa. Super. 1989), *appeal granted*, 575 A.2d 566, 568 (1990); Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4TH 294 (1983) (superceding 32 A.L.R.3D 508 (1970)).

2. 62 AM. JUR. 2D *Premises Liability* §§ 159-61 (1990).

3. *Id.* §§ 136-37.

4. *Id.*

hunters and fishermen. Applying the "status equals duty owed" approach resulted in imposing on owners and occupiers a duty to warn users of the hazards that might be encountered on the property. To a landowner with much land, complying with the duty to warn could be expensive, and complete compliance might be difficult to achieve. A second concern involved classifying a land user as a licensee simply because an owner gave implied permission to use the property, as when a landowner discovers a trespasser on the property, but takes no steps to expel the trespasser from the land. Does this failure to expel the trespasser constitute implied permission to remain on the land?⁵ Must a landowner conduct a seven day, twenty-four-hour per day patrol to keep unwanted people off the property?

Legislatures recognized the potential liability of owners and occupiers for injuries that occur to others using their land. In response, several acts were passed to modify the traditional rules for determining liability. In Pennsylvania, for example, the Act of September 27, 1961, P.L. 1969, protected owners of agricultural land or woodlands from personal injury liability to hunters or fishermen on the owner's property, unless the injury was deliberately or willfully inflicted by the owner. Concerns about potential liability, arising from owners and occupiers willing to make their land available for recreational use activities, should be addressed.

During the 1960s, dramatic changes took place in the form of growing criticism of the status-equals-duty-owed approach. *Rowland v. Christian*⁶ challenged the idea that a landowner's duty should vary with the injured party's status at the time injury occurred. Others criticized the arbitrary and fleeting nature of the status determination.⁷ The landowner's status as a protected class also changed as issues of personal safety became

5. See, e.g., *Mann v. Des Moines Ry. Co.*, 232 Iowa 1049, 7 N.W.2d. 45, 51 (1942) (acquiescence by railroad company in allowing public use of railway crossing establishes status of licensee, not trespasser).

6. 69 Cal. 2d 108, 70 Cal. Rptr. 97, 104, 443 P.2d 561, 568 (1968), *superceded* by statute, as stated in *Perez v. South Pacific Transp. Co.*, 218 Cal. App. 3d 462, 267 Cal. Rptr. 100 (1990).

7. See, e.g., *Antonace v. Ferri Contracting Co.*, 320 Pa. Super. 519, 467 A.2d 833, 839 (1983):

A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to the door from what it is when he goes away. Does he change his color in the middle of the conversation? What is the position when you discuss business with him and it comes to nothing?

(quoting Comments of Lord Justice Denning in *Dunster v. Abbott*, 2 All E.R. 1572, 1574 (C.A. 1953)).

more important when compared to issues of providing greater flexibility for landowners.⁸ Courts also questioned whether such emphasis on status led to harsh results and wasted effort by focusing on the injured party's status rather than the landowner's conduct in relation to the injured party.⁹ The common law classifications became increasingly difficult to apply. Subtle refinements blurred the distinctions, leading to confusion and the creation of narrow exceptions.¹⁰

Two alternative theories developed among those jurisdictions that chose to abandon the status-equals-duty-owed approach. One alternative theory simply asks, did the landowner exercise reasonable care in the maintenance of the property in view of the probability and foreseeability of injury to others who used the owner's premises?¹¹ Under this concept, all three classifications are replaced with but a single inquiry about reasonable care. Status, although not determinative of the duty owed, is not completely irrelevant. The degree of reasonable care an owner exercises toward an unknown, intentional trespasser is probably significantly less than the reasonable care exercised toward a business invitee. However, liability determinations are decided on a case-by-case basis under this "reasonable care under the circumstances" approach.

Some jurisdictions favored doing away with both licensee and invitee status, but were reluctant to completely eliminate the status of trespasser. In those jurisdictions, the status of the injured person as a trespasser is only one element among many considered in determining an owner's liability under the ordinary standards of negligence.¹²

The concept of encouraging private landowners to make their land available to the general public began to develop in this context. In its 1965 Suggested State Legislation, the Council of State Governments proposed the adoption of a model act to limit an owner or occupier's liability for injury occurring on the owner's property.¹³ The Council noted that every reasonable encouragement should be given to private owners who are willing to make their land available to the general public without charge.¹⁴ If an owner treats access to land on a business or

8. *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 101 (1972).

9. *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 541, 489 P.2d 308, 311-12 (1971).

10. *Rowland*, 70 Cal. Rptr. at 102, 443 P.2d at 566.

11. *Id.* at 104, 443 P.2d at 568.

12. *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972). At the present time, a majority of states follow the traditional common-law approach, while 11 states follow the rule of reasonable use, and seven states have modified the rule to apply a special rule in the case of an injured trespasser. *Id.*

13. Council of State Governments, *Public Recreation on Private Lands: Limitations on Liability*, 24 SUGGESTED STATE LEGISLATION 150 (1965) [hereinafter 1965 MODEL ACT].

14. *Id.*

commercial basis, there is little reason to treat the owner differently from other business owners.¹⁵

In 1979, the National Association of Conservation Districts and others¹⁶ commissioned W. L. Church, Associate Dean of the University of Wisconsin Law School, to conduct a study of landowner liability and trespass laws.¹⁷ The study's scope went beyond civil liability concepts and considered the criminal law question of trespass to another's land.¹⁸ The study resulted in a proposed refined model act, incorporating a landowner's concerns about liability protection for injuries occurring on the property with the sensitive issue of maintaining a landowner's ability to control his or her own premises.¹⁹

Purpose

The purpose of this Article is to examine how legal systems throughout the United States have applied the concepts and issues raised by adoption of recreational use statutes. This Article will highlight the key issues that affect applicability of the acts to specific situations and the extent of actual protection afforded to landowners. This Article will then examine and evaluate significant suggestions for amending or modifying recreational use statutes.

II. COMPARISON OF THE 1965 AND 1979 MODEL ACTS

A. The 1965 Model Act

The stated purpose of the 1965 Model Act was to encourage owners to make land and water areas available to the public for recreational purposes by limiting owner's liability toward persons who enter their property for such purposes.²⁰ Protection from liability was extended to holders of a fee ownership interest, as well as to tenants, lessees, occupants, and persons in control of premises.²¹ The Act benefitted roads, waters, watercourses, private ways and buildings, structures, and machinery or equipment attached to realty.

15. *Id.*

16. Others include the International Association of Fish and Wildlife Agencies, the National Rifle Association, the National Wildlife Federation, and the Wildlife Management Institute.

17. W.L. CHURCH, REPORT ON PRIVATE LANDS AND PUBLIC RECREATION 6 (1979) [hereinafter CHURCH REPORT].

18. *Id.*

19. *Id.*

20. 1965 MODEL ACT, *supra* note 13, § 1.

21. *Id.* § 2.

Recreational activities within the purview of the 1965 Model Act include hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports, and viewing or enjoying historical, archeological, scenic, or scientific sites.²² In describing the protection afforded owners and occupiers, the Act states that an owner or occupier owes no duty of care to keep premises safe for entry or use by others for recreational purposes, or to give any warning of dangerous conditions, uses, structures, or activities to persons entering the premises for such recreational purposes.²³ If an owner directly or indirectly invites or permits any person to use the property for recreational purposes without charge, the owner does not assure that the premises are safe for any purpose, nor confer the status of licensee or invitee on the person using the property, nor assume responsibility for or incur liability for any injury to persons or property caused by any act or omission of persons on the property.²⁴

The protection afforded by the 1965 Model Act is not intended to be absolute.²⁵ Should injury to users of the property be caused by the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity, protection of the Act is lost. Likewise, if the owner imposes a charge for use of the property, protection is lost.²⁶ If an owner leases land to a state or local government, any consideration the owner receives for the lease is not deemed to be a charge. Therefore, unless the owner and state government agree otherwise in writing, the protection of the Act would be extended to the owner. Within the context of the 1965 Model Act, "charge" includes any admission price or fee asked in return for invitation or permission to enter or go up on the land.²⁷

B. Proposed Model Act of 1979²⁸

W. L. Church's 1979 study of landowner liability and trespass laws noted two deficiencies: (1) Liability law is generally too protective of users, and injured persons have been granted recoveries so often that landowners are discouraged from opening their land for recreational use;

22. *Id.*

23. *Id.* § 3.

24. *Id.* § 4.

25. *But see* OHIO REV. CODE ANN. § 1533.181 (Baldwin 1984); *McCord v. Ohio Div. of Parks & Recreation*, 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978); IDAHO CODE § 36-1604 (Supp. 1990).

26. 1965 MODEL ACT, *supra* note 13, § 6.

27. *Id.* § 2.

28. CHURCH REPORT, *supra* note 17, app. D [hereinafter 1979 PROPOSED MODEL ACT].

and (2) both laws are too complex and confusing to be either predictable or understood.²⁹ As a result, landowners are reluctant to make their land available, and the public has fewer recreational choices. Criminal trespass laws are also practically unenforceable. For example, landowners often are unable to stop trespassers or to otherwise identify persons who violate their privacy. Calculating damages is difficult, and payment of fines may not deter future misconduct.³⁰ Because of their many different forms, criminal trespass statutes create doubt and ambiguity about the type of conduct that is prohibited. Areas of ambiguity include: (1) Who is subject to the criminal sanction — any user, or only those who enter with a particular intent? (2) Does the statute apply only when the owner or occupier of the premises notifies the public that private land is not available for public use? (3) If notice is required, will posting satisfy the requirement? (4) What kind of posting by the owner or occupier will satisfy the requirement? (5) Is special language or size required?

In the 1979 Proposed Model Act, "land" includes all real property, land, and water, and all structures, fixtures, equipment, and machinery thereon.³¹ "Owner and occupiers" include individuals, entities, or governmental agencies that have an ownership or security interest or lease, or right of possession in the land.³² "Recreational uses" include any activities undertaken for exercise, education, relaxation, or pleasure on land owned by another.³³

The 1979 Proposed Model Act offers protection similar to the 1965 Model Act. Under the 1979 Proposed Model Act, an owner of land does not owe anyone a duty of care to keep the land safe for recreational use. Likewise, the owner has no duty to give any general or specific warning with respect to a natural or artificial condition, structure, personal property, or activity thereon.³⁴ Landowners who directly or indirectly invite or permit others to use their land for recreational use without charge do not thereby extend assurance that the premises are safe for any purpose regardless of whether the land is posted. They do not confer the invitee status, or any other status that requires a duty of special or reasonable care. Finally, they do not assume responsibility or liability for injury caused by a natural or artificial condition, structure, or personal property on the premises, or assume responsibility for damage caused by the act or omission of another.³⁵

29. *Id.* at 6.

30. *Id.* at 16.

31. *Id.* § 2.

32. *Id.*

33. *Id.*

34. *Id.* § 3.

35. *Id.* § 4.

The protection afforded by the 1979 Proposed Model Act is not absolute. Owners and occupiers of land remain liable for malicious, but not merely negligent, failures to guard or warn against ultrahazardous conditions, structures, personal property or activities actually known to the owner or occupier to be dangerous. They remain liable for injuries suffered by persons who pay a charge to enter the land. Finally, they remain liable for injuries suffered by children younger than twelve years of age who are injured on land in an urban or residential setting if liability would otherwise be imposed under the doctrine of attractive nuisance as defined by section 339 of the Restatement (Second) of Torts.³⁶

The most significant departure from the 1965 Model Act made by the 1979 Proposed Model Act is in the area of recreational trespass. This concept is now included with the civil liability-limiting features in a comprehensive liability and landowner control format. "Recreational trespass" means entry on land for a recreational use without the express or implied consent of the owner, or remaining on land for recreational use after being asked to leave.³⁷ The presence of a person on the land of another without an explanation for being there is prima facie evidence that a person is on land for a recreational purpose. Failure to post land, standing alone, is not sufficient to imply consent. However, other factors such as continuous and notorious acquiescence in public recreational use may be considered in order to imply consent.³⁸

The burden of proof on the issue of implied consent is on the recreational user. If land is posted, consent to enter may not be implied. To constitute proper posting, signs must be conspicuously placed to afford a reasonable opportunity for a conscientious person to detect them and the warnings they convey. Prima facie evidence of conspicuous posting consists of proof that posters are placed at least once every 400 feet around the perimeter of land, or at least once every twenty acres of land, and that the posters are of a type that could withstand the elements for twelve months prior to the entry in question.³⁹

In addition to recreational trespass, the 1979 Proposed Model Act defined other violations. Destruction or vandalism of any sort while engaged in recreational use, littering, and failure to leave gates, doors, fences, roadblocks, obstacles, or signs in the condition they were found in also constitute violations.⁴⁰ Violations of these prohibitions result in civil forfeiture of not more than \$100, plus costs and taxes, and may result in a civil action in which reasonable punitive damages may be

36. *Id.* § 5.

37. *Id.* § 2(5).

38. *Id.* § 6.

39. *Id.*

40. *Id.* § 7.

awarded.⁴¹ All or part of the civil forfeiture amount may be paid to the owner of the land as compensation for damages, attorney's fees, or inconvenience suffered due to the violations.⁴²

Any local, county, or state law enforcement officer may enforce the 1979 Proposed Model Act by issuing a citation, enforced through a civil citation and hearing procedure. Convictions, guilty pleas, or pleas of no contest result in the revocation of current hunting, fishing, or snowmobiling licenses. Additionally, the guilty party may not reapply for such licenses for one year.⁴³

Certain offenses are considered aggravated violations under the 1979 Proposed Model Act if they occur while the recreational trespass occurs. These include: (1) operation of a motorized vehicle in a way that endangers others; (2) intentionally or accidentally lighting a fire or performing an act inherently dangerous to persons or property; or (3) shooting a firearm or bow and arrow, or setting traps for animals.⁴⁴ The penalty for conviction of an aggravated violation is increased to \$300. Items of personal property may be forfeited to the citation-issuing officer to secure payment of the amount due upon conviction. If payment of the fine is not made within thirty days after final disposition, the seized property can be sold at public sale and applied to the amount due.⁴⁵ If a defendant is convicted of a second violation within one year of a first conviction (or plea of guilty or no contest), the maximum penalties are doubled.⁴⁶ If a defendant is convicted of violating the 1979 Proposed Model Act, and within three years prior to the conviction the defendant fails to pay or honor any deposit specified in a citation or to appear to contest a citation, the maximum penalties for the conviction can be multiplied by a factor of ten.⁴⁷

III. RECREATIONAL USE STATUTES IN THE COURTS

A. *Constitutionality Under Federal and State Rules*

Recreational use statutes, as modifiers of the general rules for determining liability, pose several constitutional questions involving equal protection, equal access to the courts, and due process of law. After enactment of these laws, several challenges have been brought by plaintiffs

41. *Id.* § 8.

42. *Id.* § 10.

43. *Id.* § 14.

44. *Id.* § 12.

45. *Id.* § 14.

46. *Id.* § 16.

47. *Id.* § 17.

who feared the liability-limiting feature would be an insurmountable roadblock to recovery for personal injuries. In all such cases, courts upheld the statute against these challenges. However, in North Carolina the legislature repealed its recreational use statute on the basis of unconstitutionality.⁴⁸

1. *Equal Protection*.—Statutes that limit a property owner's liability for injuries sustained on his or her property are not special laws in contravention of the state constitution, and do not deny equal protection.⁴⁹ If the statute does not affect a suspect class or a fundamental right, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge.⁵⁰ Users of another's property have always been considered a distinct class, with their rights distinguishable from the rights of other users. Opening up vast areas of vacant but private lands to the general public's use for recreational purposes is a legitimate state objective, and the statutory limitation of liability is rationally related to that purpose.⁵¹

2. *Denial of Access to the Courts and Due Process of Law*.—A number of state constitutions provide that "[a]ll courts are to be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law"⁵² Statutory schemes, such as recreational use statutes, do not restrict the right to redress for an actionable injury; rather, they redefine the injury or the class of persons to which the constitutional right of redress attaches. Thus, the right of redress for injury is constitutional in nature, but the nature of a specific injury is a right derived from the common law or statute.⁵³ A statute limiting the liability of owners who provide the public with park area for outdoor recreational purposes is a reasonable exercise of legislative power, and does not violate the constitutional requirement that courts be open to every person for redress of any injury.⁵⁴

48. B. VAN DER SMISSEN, RECREATIONAL USER STATUTES 1 (1987) (referring to N.C. GEN. STAT. § 113-120.5 to .7, repealed by Sessions Laws 1980, C. 830, S. 1).

49. *Goodson v. City of Racine*, 61 Wis. 2d 554, 213 N.W.2d 16, 20, (1973). Plaintiff challenged a recreational use statute on grounds that it violated art. IV, § 32 of the Wisconsin Constitution, which requires: "The legislature shall provide general laws for the transaction of any business that may be prohibited by section thirty-one of this article, and all such laws shall be uniform in their operation throughout the state."

50. *Ryszkiewicz v. City of New Britain*, 193 Conn. 589, 479 A.2d 793, 798 (1984).

51. *Genco v. Connecticut Light & Power Co.*, 7 Conn. App. 164, 508 A.2d 58, 63 (1986).

52. See, e.g., CONN. CONST. art. I, § 10.

53. *Genco*, 508 A.2d at 63.

54. *Abdin v. Fischer*, 374 So. 2d 1379, 1381 (Fla. 1979), *rev'd sub nom.* *Sea Fresh Frozen Products, Inc. v. Abdin*, 411 So. 2d 218 (Fla. Dist. Ct. App. 1982), *petition denied*, 419 So. 2d 1195 (Fla., 1982).

B. *How Should the Act be Interpreted?*

Courts are split on how recreational use statutes should be interpreted. Some courts hold that recreational use statutes do not alter the common-law duty toward adult trespassers, but do reduce the owner or occupier's duty to licensees. In these cases, the statute is in derogation of the common-law determination of duty, and therefore its provisions must be strictly construed.⁵⁵

Other courts describe such statutes as merely codifications of the common-law duty owed by owners and occupiers of land to licensees, and therefore they are to be construed liberally in order to give them validity and to fulfill their purpose.⁵⁶ The question of interpretation is central to evaluating the concept's significance because extension of the statute's protection arguably would benefit landowners at the expense of land users. Because both model acts still impose liability in cases of willful or malicious failure to guard or warn against a dangerous condition, liability in such cases is comparable to the common-law duty of a landowner or occupier to warn those entering the land of dangerous conditions on the land. This analysis, however, overlooks the requirement that the failure to guard or warn must be willful or malicious, rather than merely a negligent oversight or omission. Resolving this question is uniquely a matter of local law and a question of the extent of liability protection legislatures are willing to extend. The lack of a consensus, however, creates the potential for different results from one jurisdiction to another, and creates confusion among those whom the act is intended to benefit.

C. *Who is Protected by a Recreational Use Statute?*

Under the 1965 Model Act, a possessor of a fee interest in property or a lesser interest, such as a tenant, lessee, occupant, or a person in control of the premises can claim the Act's protection.⁵⁷ The 1979 Proposed Model Act, however, protects *any* individual, legal entity, or

55. *O'Connell v. Forest Hill Field Club*, 119 N.J. Super. 317, 320-21, 291 A.2d 386, 388 (1972). The court refused to apply the New Jersey Landowner Liability Act, N.J. STAT. ANN. § 2A-42A-2, to a situation in which a three-year-old infant, who was known to have previously trespassed onto the defendant's golf course, fell into an excavation and was injured. In the court's view, this set of facts was not the type of "sport and recreational activity" to which the Act would apply. *O'Connell*, 119 N.J. Super at 322, 291 A.2d at 389.

56. *Thomason v. Olive Branch Masonic Temple*, 156 Mich. App. 736, 401 N.W.2d 911, 912 (1986). The court concluded that the Michigan recreational use statute, MICH. COMP. LAWS § 300.201, applied to a one-acre unimproved parcel of land in an urban area. MICH. COMP. LAWS ANN. § 300.201 (West Supp. 1990).

57. 1965 MODEL ACT, *supra* note 13, § 2(a).

governmental agency having any ownership or security interest or having a lease or right of possession in land.⁵⁸ Among the decisions focusing on the eligibility of an interest holder, protection has been extended to easement holders,⁵⁹ contractors whose possession is related only to completion of a repair contract,⁶⁰ and those whose status can be classified as lessee rather than licensee.⁶¹ Regarding the 1979 Proposed Model Act, the decision to extend protection to holders of security interests is intriguing. This group has not faced a significant threat of exposure to liability in cases of recreational use. If the group is not being significantly threatened, why should protection be extended?

A more widely litigated issue on the question of who is entitled to the Act's protection is how the Act treats federal, state, or local governmental entities. The federal government owns significant acreage in recreational use. The Federal Tort Claims Act⁶² makes the United States liable for the negligence of its agents and employees in the same manner and to the same extent as a private individual would be in similar circumstances. If a jurisdiction protects landowners who offer their land for recreational use, the United States, as a landowner conducting the same activity as private landowners, should have the same protection.⁶³ In states such as Illinois that extend recreational use statute protection only to landowners who hold their land out to the public for recreational use on an infrequent basis, the government would be subject to the same rules.⁶⁴

When a state or local government is the owner, occupier, or entity in control of premises on which injury occurred, the application issue has had mixed results. In some cases, the court interpreted "owner" to include state or local governmental entity, thereby extending the protection to such entity.⁶⁵ In many cases, however, the question of extending recreational use protection to government entities also involves a question of whether sovereign immunity applies to the agency. In recent years, sovereign immunity has received considerable attention, resulting in widespread revision of the concept and its application.

In *Hovert v. City of Bagley*,⁶⁶ the Minnesota Supreme Court held that the purpose and title of the Minnesota recreational use statute⁶⁷

58. 1979 PROPOSED MODEL ACT, *supra* note 28, § 2(2).

59. *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786, *aff'd in part, rev'd in part*, 394 Mich. 459, 231 N.W.2d 653 (1975).

60. *Denton v. L.W. Vail Co.*, 23 Or. App. 28, 541 P.2d 511, 515 (1975).

61. *O'Shea v. Claude C. Wood Co.*, 97 Cal. App. 3d 903, 159 Cal. Rptr. 125, 128-29 (1979).

62. 28 U.S.C.A. § 2674 (West 1965).

63. *Simpson v. United States*, 652 F.2d 831, 833 (9th Cir. 1981).

64. *Miller v. United States*, 442 F. Supp. 555, 561 (N.D. Ill. 1976).

65. *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766, 767 (1984).

66. 325 N.W.2d 813 (Minn. 1982).

67. MINN. STAT. ANN. §§ 87.01-.03 (West Supp. 1990).

plainly refer to public use of private land; therefore, the legislature did not intend to have public land included in the recreational use statute.⁶⁸ Because the legislature passed the recreational use statute after adopting new sovereign immunity rules, the legislature easily could have included state government within the recreational use statute if it had intended to do so.⁶⁹ In *Pennsylvania v. Auresto*,⁷⁰ the Pennsylvania Supreme Court reasoned that when the Pennsylvania legislature restored limited sovereign immunity, immunity was waived as a bar to actions against the Commonwealth for damages that would be recoverable if the injury was caused by a person not having the defense of sovereign immunity.⁷¹ When the recreational use statute was passed, the legislature intended the Commonwealth's exposure to suit to be the same as a private citizen's exposure. If private citizens could seek the protection of the recreational use statute, so could the Commonwealth.⁷²

In contrast, in *Pensacola v. Stam*⁷³ the court held that the purpose of the Florida recreational use statute⁷⁴ was to encourage private citizens and entities to make their land available for public recreation.⁷⁵ A governmental body needs no such motivation. Its principal purpose for owning public park land is to make the park available for public use. Therefore, the recreational use statute should not be interpreted to extend its protection to governmental entities that are already charged with making their land available to the public. If a statutory interpretation does not further a statutory purpose, the interpretation has no basis and cannot be sustained.

D. To What Type of Property Does the Act Apply — Land in Rural Areas, Urban Areas, or Both?

The 1965 Model Act includes land, roads, waters, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty in the definition of land.⁷⁶ From these rather general guidelines, courts have added an additional qualification that looks to the location of the land as a determinant of coverage. Should

67. MINN. STAT. ANN. §§ 87.01-.03 (West Supp. 1990).

68. *Hovert*, 325 N.W.2d at 815.

69. *Id.* at 816.

70. 511 Pa. 73, 78, 511 A.2d 815, 817 (1986).

71. *Id.*

72. *Id.*

73. 448 So. 2d 39, 41 (Fla. Dist. Ct. App. 1984).

74. FLA. STAT. ANN. § 375.251 (West 1988).

75. *Pensacola*, 448 So. 2d. at 41.

76. 1965 MODEL ACT, *supra* note 13, § 2; *see also* 1979 PROPOSED MODEL ACT, *supra* note 28, § 2(1).

the Act extend its protection to all landowners, or only to a select group? Courts have used a variety of approaches to resolve the issue.

Interpreting New Jersey's recreational use statute,⁷⁷ the New Jersey Supreme Court in *Harrison v. Middlesex Water Company*⁷⁸ held that the Act does not grant immunity to owners or occupiers of land located in residential and populated neighborhoods.⁷⁹ Under the New Jersey Act, an owner of land is granted protection whether or not the land is posted under New Jersey law.⁸⁰ The reference to the posting statute is a strong indication, in the supreme court's opinion, that the legislature intended the recreational use statute to apply to underdeveloped, open and expansive rural and semi-rural properties where hunting, fishing, trapping, and other recreational activities might be expected to occur.

In determining whether a tract of land is within the purview of the Act, the tract's size and location are relevant factors. Would it be reasonable to expect a landowner, without extraordinary effort, to maintain supervision over the property in question such that those who enter for recreational purposes would be noticed?⁸¹ If it is unreasonable or impractical to expect the landowner to maintain such supervision, the recreational use statute can be interpreted to apply to such tracts.⁸² In *Ratcliff v. Town of Mandeville*,⁸³ the Louisiana Supreme Court followed precedent and held that the Louisiana recreational use statute⁸⁴ applied to land that is underdeveloped, nonresidential, and rural or semi-rural.⁸⁵

In *Wymer v. Holmes*,⁸⁶ the Michigan Supreme Court held that the legislature intended that Michigan's use statute⁸⁷ apply to specifically enumerated outdoor activities that generally require large tracts of open, vacant land in a relatively natural state.⁸⁸ It was not intended to cover urban, suburban, and subdivided lands.⁸⁹ In *Paige v. North Oaks Partners*,⁹⁰ the court found nothing in the statute or its legislative history

77. New Jersey Landowner's Liability Act, N.J. STAT. ANN. § 2A:42A-2 (West 1987).

78. 80 N.J. 391, 403 A.2d 910 (1979).

79. *Id.*

80. N.J. STAT. ANN. § 23:7-1 to -8 (West Supp. 1990).

81. *Scheck v. Houdaille Constr. Materials, Inc.*, 121 N.J. Super. 335, 342, 297 A.2d 17, 21 (N.J. Super Ct. Law Div. 1972).

82. *Wymer v. Holmes*, 429 Mich. 66, 412 N.W.2d 213, 219 (1987); *Krevics v. Ayars*, 141 N.J. Super. 511, 358 A.2d 844, 846 (Salem County Ct. 1976).

83. 502 So. 2d 566, 567 (La. 1987).

84. LA. REV. STAT. ANN. § 9:2795 (West Supp. 1990).

85. *Ratcliff*, 502 So. 2d at 567.

86. 429 Mich. 66, 412 N.W.2d 213 (1987).

87. MICH. COMP. LAWS § 300.201 (1984).

88. *Wymer*, 412 N.W.2d at 219.

89. *Id.*

90. 134 Cal. App. 3d 860, 184 Cal. Rptr. 867, 869 (1982). This case involved a

that evidenced a legislative intent to relieve all landowners of liability for injury to trespassing children whose activities are considered recreational.⁹¹ Although the statute can be interpreted literally to apply to a given situation, this interpretation should not prevail over the actual purpose of the legislation.

E. *What Activities are Considered Recreational?*

Each of the model acts defines differently those recreational activities that bring the act into play. The 1965 Model Act specifies activities such as hunting, fishing, swimming, boating, and camping.⁹² The 1979 Proposed Model Act resolves the problem of how to treat activities that do not appear on the list by using general terms such as "any activity undertaken for exercise, education, relaxation or pleasure."⁹³ In addition, a number of states have added their own specific activities.⁹⁴

Several courts have considered whether specific activities are considered "recreational" for purposes of the Act. *Villanova v. American Federation of Musicians*⁹⁵ observed that activities described in the New Jersey recreational use statute are more often than not physical, are typically performed outdoors, and are not generally considered spectator sports.⁹⁶ Applying this standard, the court denied coverage to a band member injured while approaching a bandstand.⁹⁷ *Fisher v. United States*⁹⁸ added that if the general public reasonably regards the activity as recreational, the recreational use statute should also consider it as such.⁹⁹ Accordingly, the court concluded that a child injured at a picnic on a school field trip was engaged in a "recreational activity" when the injury occurred.¹⁰⁰ The court in *Smith v. Scrap Disposal Corporation*¹⁰¹ con-

minor who was injured while jumping over an open trench at a temporary construction project near the loading dock of a supermarket, in an urban shopping center. The landowner defended by asserting that the California recreational use statute immunized the landowner. See CAL. DIV. CODE § 846 (West Supp. 1990).

91. *Paige*, 184 Cal. Rptr. at 869.

92. 1965 MODEL ACT, *supra* note 13, § 2. Other acts that are considered recreational are picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archeological, scenic, or scientific sites.

93. 1979 PROPOSED MODEL ACT, *supra* note 28, § 2(3).

94. See, e.g., MD. NAT. RES. CODE ANN. §§ 5-1101(c) and 5-1102(a) (1984), which added "educational activities" to the list found in the 1965 MODEL ACT.

95. 123 N.J. Super. 57, 59, 301 A.2d 467, 469 (1973).

96. *Id.*

97. *Id.*

98. 534 F. Supp. 514, 516 (D.C. Mont. 1982).

99. *Id.*

100. *Id.*

101. 96 Cal. App. 3d 525, 158 Cal. Rptr. 134 (1979).

sidered whether the injured person entered the property with the intent to engage in a recreational activity or some other pursuit.¹⁰²

Deciding that recreational activities conducted in rural areas should be covered, and those conducted in residential or urban areas should not, *Boileau v. DeCecco*¹⁰³ held that although swimming is a recreational activity covered by the Act, the Act was intended to apply only to those conducted in the true outdoors, rather than in a person's backyard.¹⁰⁴ The question of literal interpretation of the listed activities is closely tied to the question of how the Act is to be interpreted. *Gerkin v. Santa Clara Valley Water District*¹⁰⁵ considered whether walking a bicycle across a wooden bridge could be viewed as hiking for purposes of the statute. In concluding it did not, the court noted that although hiking included walking, this literal interpretation of activities considered to be recreational should not prevail over the plain purpose of the statute.¹⁰⁶ In addressing the question of how to interpret "other recreational pursuits," the court in *Hager v. Griesse*¹⁰⁷ held that a poolside wrestling match that resulted in one participant being thrown into a swimming pool would be included in the phrase.¹⁰⁸

Two cases that extended protection of the Act involved injuries that occurred on a beach. *Schneider v. United States*,¹⁰⁹ interpreting the Maine recreational use statute objectively rather than subjectively, held that an injury that occurred while proceeding to a beach to drink coffee stemmed from a recreational activity.¹¹⁰ *Fetherolf v. Ohio Department of Natural Resources*¹¹¹ held that sitting on a beach watching others swim was a recreational activity covered by the Act, even though the injured person did not swim.

The fact that injury occurs at a place where recreational activities normally occur is not determinative of whether the Act applies. In *Smith v. Southern Pacific Transportation Company*,¹¹² the court held that simply because an accident occurred as a truck drove through a city park on travel not associated with recreation was not enough to invoke the Act's protection. In *Harrison v. Middlesex Water Co.*,¹¹³ the court held that

102. 158 Cal. Rptr. at 137.

103. 125 N.J. Super. 263, 310 A.2d 497 (1973).

104. *Id.* at 267, 310 A.2d at 499-500.

105. 95 Cal. App. 3d 1022, 157 Cal. Rptr. 612 (1979).

106. *Gerkin*, 157 Cal. Rptr. at 615-16.

107. 29 Ohio App. 3d 339, 505 N.E.2d 982 (1985).

108. 505 N.E.2d at 986.

109. 760 F.2d 366 (1st Cir. 1985).

110. *Id.* at 368.

111. 7 Ohio App. 3d 110, 454 N.E.2d 564, 566 (1982).

112. 467 So. 2d 70, 73 (La. 1985).

113. 80 N.J. 391, 402, 403 A.2d 910, 915 (1979).

an individual injured while attempting to rescue two children who had fallen into a frozen pond was not engaged in recreation when the injury occurred.

F. Exceptions to the Act's Protective Provisions — Imposing a Charge for Use of the Premises

When the 1965 Model Act was developed, it was clearly intended to encourage landowners to make their land available for recreational use without a charge or cost being imposed on the user. The Act specifically stated that nothing in it would limit liability for injury suffered when the landowner imposed a charge on the person who entered the land.¹¹⁴ "Charge" is defined broadly as an admission price or fee asked in return for an invitation or permission to go on the land of another.¹¹⁵ If a charge is imposed, the recreational use statute does not apply, and the landowner owes the requisite duty to those who paid a fee to use the land.

The 1979 Proposed Model Act focused on the question of a landowner's ability to impose a charge and still gain protection from the Act. A frequent complaint about the 1965 Model Act was its sweeping definition that could include many types of exchanges, such as sharing fish or game, or holiday gifts. Landowners also argued that stubborn adherence to the prohibition against charging a fee imposed a severe disadvantage upon them because they could not even recover the costs incurred in making the land available for recreation without losing the protection of the Act.¹¹⁶ If this situation was allowed to continue, landowners would find that the cost of providing access outweighs the benefits, and would then choose to deny access. Landowners could cut costs and minimize liability exposure simply by eliminating access that could lead to injury.

The 1979 Proposed Model Act addressed this problem by redefining "charge." The term would still include an admission fee for entry, but it would specifically exclude such items as sharing fish and game, contributions in kind, services or cash paid for the sound conservation of the land, and sums paid by private individuals or associations when the annual aggregate of such sums did not exceed a limit set by an adopting state.¹¹⁷ Several states also recognized the landowners' dilemma, and

114. 1965 MODEL ACT, *supra* note 13, § 6(a).

115. *Id.* § 2(d).

116. Owen, *Recreational Use on Industrial Forest Ownership Problems and Opportunities*, Proceedings of the Conference on Income Opportunities for the Private Landowner Through Management of Natural Resources and Recreational Access (WVA Univ. Coop. Ext. Ser. 362-64 (1990)) [hereinafter "Recreational Use Conference"].

117. 1979 PROPOSED MODEL ACT, *supra* note 28, § 5(2).

modified their recreational use statutes to allow a landowner some flexibility in accepting funds to offset costs and expenses of making the land available.¹¹⁸

In states having a generally defined "charge," several decisions provide important definition to the purpose it serves. The policy underlying the "consideration" exception is to retain tort liability when use is granted in return for an economic benefit. In these situations, the potential for profit is considered sufficient to encourage owners who want to make commercial use of their land to open it to the public. The further stimulus of tort immunity is unnecessary.¹¹⁹ Such landowners can purchase liability insurance and spread the cost of accidents among all users of the land.

Several cases have examined the issue of direct versus indirect fee payment. In *Kisner v. Trenton*,¹²⁰ the court held that by allowing people to swim for free, a marina operator encouraged prospective customers to come to the site and thereby increased the marina's sales. The court concluded that a charge was imposed on the user. Receipt of a portion of the gross receipts from the concessions, although indirectly received by the landowner, was sufficient to conclude that the landowner received consideration in return for the use of the recreational facility.¹²¹ Under the Mississippi recreational use statute,¹²² operation of a concession stand by a landowner on the recreational area will prevent the application of

118. *E.g.*, ARK. STAT. ANN. tit. 18, ch. 11, § 302(4) (1987) provides that contributions in kind, services, or cash paid to reduce and/or offset costs and eliminate losses from recreational use are excluded from the definition of "charge." Sharing of game, fish, or other products of recreational use are also excluded. *Id.*

TEX. CIV. PRAC. & REM. CODE ANN. § 75.003(c)(2) (Vernon Supp. 1990) provides that owners, lessees, and occupiers whose total charges for entry to the premises collected in the previous calendar year for all recreational use exceed twice the amount of the *ad valorem* taxes imposed on the premises are excluded from the Texas Limitation of Landowner Liability Act.

WIS. STAT. ANN. § 895.52(6)(a) (West Supp. 1990) provides that the recreational use statute does not apply to owners who collect money, goods, or services in payment for the use of their land in an aggregate amount of more than \$2000 in the year in which the injury occurs. The following items are not considered payment to a private property owner: Gifts of wild animals or other products of the recreational activity; indirect nonpecuniary benefits; donation of money, goods, or services for management and conservation of resources on the property; payment of not more than \$5 per person per day for permission to gather any product of nature on an owner's property; payments received from governmental bodies; and payments received from a nonprofit organization for a recreational agreement. *Id.*

119. *Ducey v. United States*, 713 F.2d 504, 510-11 (9th Cir. 1983).

120. 158 W. Va. 997, 216 S.E.2d 880, 885-86 (1975).

121. *Ducey*, 713 F.2d at 513-14.

122. MISS. CODE ANN. § 89-2-7 (Supp. 1990).

the statute to injuries suffered by recreational users.¹²³ In *Jones v. United States*,¹²⁴ the court held that payment of a \$1.00 rental fee to a concessionaire for an inner tube used at a snow play area was not a charge for the use of the land such that the owner would lose the immunity of the recreational use statute.

At least two courts have considered whether fees paid to park vehicles at a recreational site constitute consideration. In *Hogue v. Stone Mountain Memorial Association*,¹²⁵ a fee paid to enter and re-enter a recreational area was deemed a motor vehicle fee and not a fee for recreational use of the park.¹²⁶ In *Huth v. Ohio Department of Natural Resources*,¹²⁷ the court held that the fee paid to park a camping trailer at a state park was a charge necessary to utilize the overall benefits of the recreational area and would be considered a charge, thereby resulting in loss of the recreational use statute's protection.¹²⁸

*Livingston v. Pennsylvania Power & Light Co.*¹²⁹ considered whether a one-time easement fee imposed on lot owners by the developer of a recreational lake to provide the lot owners with access to the lake for recreational activities was a charge. Interpreting "charge" according to its common and approved usage, the court concluded that the term signified a quid pro quo, a charge in exchange for permission to enter the land at that time.¹³⁰ Payment of the easement fee in *Livingston* was a one-time charge imposed on abutting land owners and was remote in time from the incident that injured the plaintiff. Therefore, the court concluded that payment of the easement fee could not be considered a "charge" under the Act.¹³¹

*Zackhery v. Crystal Cave Co., Inc.*¹³² also interpreted the meaning of "charge" under a recreational use statute. In *Zackhery*, the court faced the question of whether the landowner's imposition of a fee to enter a cave prevented application of the recreational use statute when the injury occurred at a place where no fee was imposed to use the

123. *Jones v. United States*, 693 F.2d 1299, 1303 (9th Cir. 1982).

124. *Id.*

125. 183 Ga. App. 378, 358 S.E.2d 852 (1987).

126. 358 S.E.2d at 854.

127. 64 Ohio St. 2d 143, 413 N.E.2d 1201 (1980).

128. 413 N.E.2d at 1203.

129. 609 F. Supp. 643 (E.D. Pa. 1985).

130. *Id.* at 648.

131. *Id.*

132. 391 Pa. Super. 471, 571 A.2d 464 (1990). In this case, the plaintiff was injured when he fell from a sliding board at a 125-acre recreational area that included a playground, parking lot, several buildings, and an underground cave. The landowner imposed a charge to enter the cave, but not to park or to use the playground where the sliding board was located.

facility. The court noted that the recreational use statute does not even hint that the immunity offered by the Act to an entire parcel of land is nullified if a landowner charges admission to a different portion of the parcel.¹³³ The court held that imposing a fee to enter the underground cave did not prevent application of the recreational use statute if the injury occurs on a portion of the property where no fee is charged.¹³⁴

Although this conclusion will find favor among landowners who eagerly greet the expansion of protection, the decision leaves some unsettled questions. For instance, is the payment of a fee the only way to lose protection, or will it also be lost if a person enters intending to pay for recreation and is injured before actually doing so? Similarly, how can the limits of the fee-based recreational area be distinguished from the free access areas? The recreational area in *Zackhery* is a comprehensive, integrated, and coordinated recreational complex where the playground is an essential accessory to the fee-paid underground cave. Having the no-cost facilities available to patrons makes this recreational area more attractive, especially to families with young children. By offering free activities, attendance at the fee-paid activity would be expected to rise. *Zackhery* did not address these questions, but they likely will be raised in the future.

G. *Requirements of Landowners Seeking Protection from Recreational Use Statutes*

The 1965 and 1979 Model Acts offer sweeping protections. An owner of land owes no duty to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity to persons entering for recreational purposes.¹³⁵ A landowner who directly or indirectly invites or permits any person to use his or her land without charge does not assure that the premises are safe for any purpose. Nor does the landowner confer the status of invitee or licensee on the user, or assume responsibility for, or incur liability for, any injury caused by an act or omission of such users.¹³⁶

Comparing sections 3 and 4, the most obvious difference is the reference to an invitation to the public to use the private land of the owner. If only one section of the law requires an invitation, can the

133. *Id.* at 475, 571 A.2d at 466.

134. *Id.*

135. 1965 MODEL ACT, *supra* note 13, § 3; 1979 PROPOSED MODEL ACT, *supra* note 28, § 3.

136. 1965 MODEL ACT, *supra* note 13, § 4. 1979 PROPOSED MODEL ACT, *supra* note 28, § 4.

other section be applied when no proof of invitation is found? Recognizing this potential dilemma, several states have modified their statutes to require some form of invitation for the act to apply.¹³⁷

In those states having adopted the Model Act without modification, the significance of an owner's willingness to accept those who want to use the land for recreation has been a frequently litigated issue. If the Act's purpose is to encourage landowners to make their land available for public recreation, must there be some evidence of compliance with this purpose for the Act to apply? If there is no evidence, or if the evidence suggests that the landowner is not willing to accept recreational users, what effect does this have on applying the benefits of the Act?

In *Gibson v. Keith*,¹³⁸ the court held that a landowner's invitation or permission is a *sine qua non* for invoking the Delaware statute's benefits.¹³⁹ Lacking evidence that the landowner offered the land for public use, there is no evidence of either a direct or indirect invitation, and therefore the protective provisions of the Act do not apply.¹⁴⁰

When evidence shows an active effort to exclude the public from use of the premises or to significantly limit public access, courts have reached mixed conclusions. Must a landowner post the land to inform the public of a willingness or unwillingness to make the land available? Has the landowner who posts "no trespassing" signs declined the opportunity to claim protection of the Act, or is it still available? If the "no trespassing" sign is interpreted as the landowner's unwillingness to consent to entry, the invitation element would be missing.¹⁴¹ On the other hand, a landowner can post the property with signs of many different types, each conveying a distinct message. For example, would a "no hunting or fishing" sign imply that other uses are permitted? Would a sign stating, "Enter at your own risk" be treated as an invitation or as a denial of an invitation?

137. See, e.g., MISS. CODE ANN. § 89-2-7 (Supp. 1990), which requires a landowner to annually publish public notice of the availability of the land for public recreation in order for the Mississippi Act to apply. R.I. GEN. LAWS § 32-6-7 (1982) requires owners who desire to make their property available under the Act to first offer permission to the public to be set forth in a letter to the Director of the Department of Environmental Management. ALA. CODE § 35-15-28 (Supp. 1990) creates a rebuttable presumption of having opened land for noncommercial public recreation when the land is posted for that purpose, or when a notice is published in a newspaper of general circulation or recorded in the public records of the county in which the land is located.

138. 492 A.2d 241 (Del. Super. Ct. 1985).

139. *Id.* at 244.

140. See, e.g., *Hughes v. Quarve & Andersen Co.* 338 N.W.2d 422, 427 (Minn. 1983); *Watters v. Buckbee Mears Co.*, 354 N.W.2d 848, 852 (Minn. Ct. App. 1984).

141. See, e.g., *Georgia Power Co. v. McGruder*, 229 Ga. 811, 194 S.E.2d 440, 441 (1972), which held that when land was posted with "keep out" signs, use of the land was expressly denied, and therefore the Georgia recreational use statute did not apply.

Two cases attempted to resolve the questions posed by these sections. In *Johnson v. Stryker Corporation*,¹⁴² the court, focusing on the provisions of sections 3 and 4 of the Illinois act that follows the 1965 Model Act, held the recreational use statute was not intended to apply only when land is open to public use. If section 3, which does not require an invitation, is not to be rendered superfluous, it must apply when no permission, either express or implied, is required.¹⁴³ If land is open to the general public, the public is directly or indirectly invited. Therefore, if the Act applies only to land open to the general public, section 3 appears to be superfluous.¹⁴⁴

The second case attempting to reconcile these questions is *Friedman v. Grand Central Sanitation, Inc.*¹⁴⁵ Interpreting the Pennsylvania recreational use statute,¹⁴⁶ the court noted that the 1966 statute replaced a statute that offered broad immunity to agricultural land and woodland owners who made their land available for hunting and fishing, except for injuries suffered as a result of the landowner's willful or deliberate acts.¹⁴⁷ The court noted that the legislature apparently felt it necessary to replace the earlier statute with another broad immunity-granting provision such as that found in section 3 of the recreational use statute, even though the immunity granted in section 3 was not in direct fur-

142. 70 Ill. App. 3d 717, 388 N.E.2d 932, 935 (1979). In this case, the plaintiff sued a landowner for injuries suffered while swimming in a pond. The landowner defended the claim by asserting the Illinois recreational use statute, ILL. ANN. STAT. ch. 70, para. 31. The plaintiff responded by arguing that the Act did not apply because the property was not open to the public. The evidence showed that although some students used the farm pond, they were supposed to ask permission first, and usually did. In addition, the landowner had posted several signs, including one that stated, "private property — no swimming on holidays." *Johnson*, 388 N.E.2d at 935.

143. *Johnson*, 388 N.E.2d at 935.

144. *Id.*

145. 524 Pa. 270, 571 A.2d 373 (1990). *Friedman* dealt with a person who was injured when he fell into a ditch on property maintained as a sanitary landfill. The person had been hunting on adjoining property and mistakenly wandered onto the landfill property. The landfill owner had clearly taken steps to exclude recreational users from the landfill areas and understandably so. In furtherance of this goal, the landfill posted "no trespassing" signs, patrolled the property, and prosecuted trespassers. Clearly this was not a situation in which the landowner offered its property for public recreation. The landfill owner defended the personal injury claim on several grounds, including the Pennsylvania recreational use statute (PA. STAT. ANN. tit. 68, § 477-1) (Purdon Supp. 1990)). In response, the plaintiff raised the conflict between the statutory purpose of the recreational use statute and the grant of immunity found in the Act. *Friedman*, 524 Pa. at 275, 571 A.2d at 375. Can the Act be applied in a way that does not further the statutory purpose, or can the Act be applied in a case such as this in which the landowner was not encouraged to make its land available to the public by the liability protection the Act offers?

146. PA. STAT. ANN. tit. 68, § 477-1 (Purdon Supp. 1990).

147. Act of Sept. 27, 1961, Pub. L. No. 1696.

therance of the purpose of the Act.¹⁴⁸ Because the legislature intended this broad immunity to apply, the provisions of section 3 can be reconciled with section 4, which requires an invitation. When the statute is clear, such as when no invitation is required under section 3, no principle of statutory construction prevents application of the clear language of section 3 in order to pursue the spirit of the statute.¹⁴⁹

Given the court's specific reference to the prior statute and the role it played in shaping the interpretation of section 3 of the recreational use statute, it is difficult to determine whether this decision will have a significant impact. Although the 1966 statute may directly follow the 1965 Model Act, the reference to the prior statute may not be as important as the court seems to think. However, although sections 3 and 4 were enacted as provided in the 1965 Model Act, the presence of the prior statute may have influenced the legislature when it considered adoption of the Act.

H. Residual Liability Not Protected by Recreational Use Statutes

The immunity-granting provisions of the 1965 and 1979 Model Acts are each subject to general provisos that differently approach the task of establishing a degree of continuing responsibility for acts and the liability they create. The 1965 Model Act creates the standard of willful or malicious failure to guard or warn against a dangerous use, condition, structure, or activity as the bottom-line limit of responsibility from which a landowner is not immunized.¹⁵⁰ The 1979 Proposed Model Act, however, sets the bottom-line limit at malicious, not mere negligent, failure to guard or warn against an ultrahazardous condition, structure, personal property, or activity actually known by the owner to be dangerous.¹⁵¹ In addition to the proposed statutes, many states have enacted other features and have applied them to their individual situations.¹⁵²

With any of these provisions, the key consideration is the meaning of the operative words and the circumstances under which the meaning is applied. For a willful injury to exist, there must be design, purpose, and intent to inflict the injury.¹⁵³ Three essential elements must be found:

148. *Friedman*, 524 Pa. at 276-77, 571 A.2d at 375-76.

149. *Id.* at 276, 571 A.2d at 376. See also *Gallo v. Yamaha Motor Corp., USA*, 526 A.2d 359 (Pa. Super. 1987).

150. 1965 MODEL ACT, *supra* note 13, § 6(a).

151. 1979 PROPOSED MODEL ACT, *supra* note 28, § 5.

152. MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1981) adds wanton and reckless conduct by the owner. MICH. COMP. LAWS ANN. § 300.201 (1990) adds injuries caused by the gross negligence of the owner. See also S.C. CODE ANN. § 27-3-60 (Law. Coop. 1977).

153. *Morgan v. United States*, 709 F.2d 580, 583 (9th Cir. 1983); *Gard v. United States*, 594 F.2d 1230, 1233 (9th Cir. 1979), *cert. denied*, 414 U.S. 866.

Actual or constructive knowledge of the peril, actual or constructive knowledge that injury is probable, and conscious failure to act to avoid the peril.¹⁵⁴ On the issue of actual or constructive knowledge of the peril and the probability of injury, not all courts agree that constructive knowledge is sufficient to classify an act as willful.¹⁵⁵ However, failure to exercise due care, or conduct amounting to negligence, does not constitute willful conduct.¹⁵⁶

For those statutes that set the bottom-line limit at acts involving gross negligence, the interpretation of that term can have several different meanings. Is it conduct that differs from ordinary negligence only in degree, but not in kind?¹⁵⁷ Is it a term that applies to a defendant who, through the exercise of reasonable care, knows or ought to know of the plaintiff's prior negligence, but who injures the plaintiff by subsequent negligence, such as that found in the tort concept of the last clear chance to avoid injury?¹⁵⁸

Gross negligence is significantly different from willful conduct. Both concepts share the element of knowledge of a situation that poses a risk of harm to the plaintiff. However, gross negligence involves the defendant's awareness of the defendant's ability to avoid injury to the plaintiff by the exercise of ordinary care and diligence, which the defendant subsequently fails to exercise. Having baited a trap, a landowner cannot stand by idly and await a victim.¹⁵⁹

Idaho and Ohio, two states enacting recreational use statutes, apparently have come closest to establishing absolute liability protection for eligible landowners. Unlike the Model Acts, the Ohio statute¹⁶⁰ is not subject to a bottom-line limit on a landowner's liability. In *McCord v. Ohio Division of Parks and Recreation*,¹⁶¹ the court held the Ohio statute precludes recovery against any landowner, including the State. The Ohio statute was to be effective in 1963, approximately two years before the advent of the 1965 Model Act.

In Idaho, section 36-1604(c) of the Idaho Code¹⁶² is intended to encourage landowners to make land and water areas available to the

154. *Von Tegen v. United States*, 557 F. Supp. 256, 259 (N.D. Cal. 1983).

155. *McGruder v. Georgia Power Co.*, 126 Ga. App. 562, 191 S.E.2d 305, 307 (1972), *rev'd on other grounds*, 229 Ga. 811, 194 S.E.2d 440 (1972).

156. *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309, 314 (1984).

157. PROSSER AND KEETON ON TORTS § 34, at 211-12 (5th ed. 1984).

158. *Taylor v. Matthews*, 40 Mich. App. 74, 82-83, 198 N.W.2d 843, 847 (1972).

159. *Lucchesi v. Kent County Road Comm'n*, 109 Mich. App. 254, 312 N.W.2d 86, 88-89, 93 (1981).

160. OHIO REV. CODE ANN. § 1533.181(a) (Baldwin 1984).

161. 54 Ohio St. 2d. 72, 375 N.E.2d 50, 52 (1978); *see also Fetherolf v. Ohio Dep't of Natural Resources*, 7 Ohio App. 3d 110, 454 N.E.2d 566, 567 (1982).

162. IDAHO CODE § 36-1604(c) (Supp. 1990).

public for recreational purposes without charge. Under the code, a landowner owes no duty of care to keep the premises safe or to give any warning of a dangerous condition, use, structure, or activity. In *Johnson v. Sunshine Mining Co., Inc.*,¹⁶³ the court held that the Idaho statute meets the equal protection test under the state and federal constitutions, although a strong dissent challenged the statute's failure to eliminate liability in the case of intentional misconduct as the Model Acts propose.¹⁶⁴ In *Jacobsen v. City of Rathdrum*,¹⁶⁵ the Idaho Supreme Court addressed the question that *Johnson* declined to answer. The court held that the recreational use statute did not preclude an owner's liability for willful or wanton conduct causing injury to a person using an owner's land for recreational purposes.¹⁶⁶ The court concluded that the statute was intended to insulate landowners only from liability predicated on a duty of care owed to an invitee or licensee, but not the duty owed to a trespasser.¹⁶⁷ Those who use an owner's land for recreational purposes are entitled to at least the same protection afforded to trespassers.¹⁶⁸

IV. HOW EFFECTIVE IS THE PROTECTION OFFERED BY RECREATIONAL USE STATUTES?

The simple answer to this question is that the protection afforded is really quite extensive, given that grants of immunity from suit are generally out of harmony with the modern trend in tort law.¹⁶⁹ Looking more closely at the question, however, it becomes clear that the protection is somewhat mixed and uncertain because several questions remain unanswered. For example, whether governmental landowners are covered by the Act is a question particularly ripe for consideration. The 1979 Proposed Model Act addresses this question by including any governmental agency that has ownership, a security interest, a leasehold, or the right to possession of land within the meaning of "owner." This direct approach answers the question raised in *City of Pensacola v. Stam*¹⁷⁰ of how to serve the Act's purpose. In addition, the direct approach avoids the circuitous argument that centers on the legislature's intention, or lack of it, to grant immunity in those states that have wrestled with sovereign immunity.¹⁷¹

163. 106 Idaho 866, 684 P.2d 268 (1984).

164. *Id.* at 871, 684 P.2d at 273 (Huntley, J., dissenting).

165. 115 Idaho 266, 269-70, 766 P.2d 736, 739-40 (1988).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Rivera v. Philadelphia Theological Seminary*, 510 Pa. 1, 12, 507 A.2d 1, 7 (1986).

170. 448 So. 2d 39, 41 (Fla. Dist. Ct. App. 1984).

171. *Hovert v. Bagley*, 325 N.W.2d 813, 815 (Minn. 1983).

The issue of the landowner's imposition of a charge on users of the land for recreational purposes bears careful consideration. Proponents of changing the statutes point out that by making the land available to those who want to use it, landowners incur expenses.¹⁷² If a landowner tries to recover these expenses, most statutes following the 1965 Model Act classify this as a charge imposed in return for use of the land, thereby triggering exclusion from the Act. Several states and the 1979 Proposed Model Act have attempted a piecemeal solution to this problem by allowing landowners to recover only minimal amounts, whether in fixed amount or by reference to other items such as taxes. In many cases, this approach provides only a partial solution.

The question of consideration paid for use attempts to differentiate landowners who want to engage in a commercial activity and bear its associated risks from landowners who do not. Landowners who intend to enter commercial activities are presumed to be aware of liability concerns and of how to deal with them. Such landowners deserve no special treatment. Noncommercial activities, however, that develop more from a willingness to permit others to use the land than from a desire to engage in a commercial activity, deserve protection. Otherwise, such landowners gain no benefit from their own generosity, yet they continue to face the risks of potential liability.

The key question, however, is where to draw the line between a commercial enterprise and a landowner who is simply willing to permit use. One court referred to this question as "[a] thicket entangled with speculation as to the motives of the landowner"¹⁷³ If the distinction turns on intention, why not make intent the central point of the inquiry? If landowners intend to carry on a commercial activity, physical signs that manifest this intent should abound, such as marketing plans, frequency of use, promotional materials, financial books and records, and tax returns. Each of these items, coupled with the landowner's direct testimony, can be evaluated to determine the owner's intent.

A third issue is whether the protection should apply to rural, urban, or both rural and urban, land. Most courts have interpreted the Act to have a decidedly rural focus. Other courts have been more liberal in analyzing which landowners are subject to the Act. Clarification would aid the statutes. Neither the 1965 Model Act nor the 1979 Proposed Model Act attempt to do so. This results in transferring of the issue to the courts for resolution. Time and the expense of litigation then forge a resolution to the question.

172. Recreational Use Conference, *supra* note 116, at 363-64.

173. *Friedman v. Grand Central Sanitation*, 524 Pa. 270, 277, 571 A.2d 373, 376 (1990).

A fourth issue having a dramatic impact on effectiveness of recreational use statutes involves the level of residual liability from which these statutes offer no protection.¹⁷⁴ The 1965 Model Act and the 1979 Proposed Model Act have somewhat different approaches. Much time and effort has been spent litigating (1) what is a willful act, and (2) what conditions must exist for that conclusion to be made. If additional criteria such as wanton conduct or gross negligence are added, further time and effort will be spent resolving the meaning of those terms. The 1979 Proposed Model Act attempts a solution by focusing on retaining liability for a malicious, but not for merely negligent, failure to guard or warn against an ultrahazardous condition, structure, property, or activity actually known by such owners to be dangerous.¹⁷⁵ Within the proposed solution are several questions that threaten to further confuse the issue. "Malice" and "ultrahazardous" are terms with varied meanings.¹⁷⁶ Which one will be applied? Should the solution to a problem be couched in terms that may become part of the problem rather than the solution? Further focus on the requirement of actual knowledge of the dangerous character of the condition, structure, property, or activity seems at first to be protective of the landowner's interest because it is a stricter requirement. Given the strictness and the dire consequences of failing to meet it, one would expect the plaintiffs' bar to make a concerted effort to litigate this requirement at every opportunity. Should the time and expense of litigation be used to clarify a point that is crucial to the application of the statute?

A final point concerns interpretation of the statute's liability protection provisions. Both the 1965 Model Act and the 1979 Proposed Model Act provide two specific statements protecting the owner's interest. One statement declares that there is no duty owed by the landowner; the second refers to a direct or indirect invitation or grant of permission. As *Friedman*¹⁷⁷ and *Johnson*¹⁷⁸ point out, interpreting the immunity provisions in light of the stated purpose of the Act can lead to apparent conflicts. *Friedman*'s reference to the prior legislative history of Pennsylvania's immunity issue weakens the significance of the case nationally. However, *Friedman*, read in conjunction with *Johnson*, provides a common-sense interpretation of the statutes and what they provide. If these interpretations lead to results that legislatures did not intend, the solution is legislative action to limit immunity only to those situations intended.

174. Except in Ohio.

175. 1979 PROPOSED MODEL ACT, *supra* note 28, § 5(1).

176. *Genco v. Connecticut Light & Power Co.*, 7 Conn. App. 164, 508 A.2d 58, 63 (1986).

177. *Friedman*, 524 Pa. 570, 571 A.2d 373.

178. *Johnson v. Stryker Corporation*, 70 Ill. App. 3d. 717, 388 N.E.2d 932 (1979).

This could be best accomplished by repealing the section 3 grant of immunity, and incorporating its ideas and concepts into section 4.¹⁷⁹

In those states having made proof of invitation an express requirement to invoke the Act, the 1979 Proposed Model Act includes the phrase "whether or not the land is posted" in the immunity-granting language of section 4. Whether this simple phrase is enough to overcome those cases that deny application of the Act when the land is posted remains to be seen. Posting the land is most often associated with the owner's right to take action to expel intruders, and arises in the quasi-criminal concept of trespass. Its application and relevance to the civil liability situation is uncertain, except in cases in which the 1979 Proposed Model Act is adopted because the 1979 Proposed Model Act brought the civil liability and trespass issues together.

V. CONCLUSION

If change in recreational use statutes is to be made, such change should be directed at clarifying ambiguities affecting the statutes' coverage and application in particular situations. Landowners will then have a clearer understanding of what the statute offers them in return for their decision to make their land available. Decisions made on a more informed and knowledgeable basis would be better decisions overall. Such decisions will contribute to accomplishing the goals and objectives of the statute.

179. For example, § 4 could be amended to read as follows:

Except as provided in this Act, an owner of land who directly or indirectly invites or permits any person to enter his land for recreational use, without charge, whether or not the land is posted, does not thereby:

- (1) extend any assurance that the premises are safe for any purpose;
- (2) owe a duty of care to anyone to keep his or her land safe for recreational use, or to give any general or specific warning with respect to any natural or artificial condition, structure, personal property or activity thereon;
- (3) confer upon such person the status of an invitee, or any other status requiring of the owner a duty of special or reasonable care;
- (4) assume responsibility for or incur liability for any injury to such a person or property caused by any natural or artificial condition, structure or personal property on the premises; or
- (5) assume responsibility for any damage or injury to any other person or property caused by an act or omission of such person.

